Due Process and Soft Law in International Arbitration

DUE PROCESS AND SOFT LAW IN INTERNATIONAL ARBITRATION

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"Personal rule should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement" [2]

1. INTRODUCTION. THE ARBITRAL PROCEDURE: FLEXIBILITY VS. PREDICTABILITY

One of the most distinguished actors and commentators in today's international arbitration stated a few years ago that "Modern arbitration is either blessed or plagued, depending on one's perspective, with a lack of fixed standards related to how arbitrators conduct proceedings" [3] . International arbitration has departed today from a cozy and closely knit network of a relatively few players, and arguably is becoming the standard system of resolving parties' disputes in international agreements in the broadest sense. There is an immense body of literature as to the reasons for such a phenomenon, and procedural flexibility is consistently cited as a very important one [4] . Nevertheless, it is maintained, among leading commentators [5] , that there are two and only two decisive reasons for this success. One is that international arbitration provides a neutral forum, avoiding the other parties' national court. The second, which also has an advantage over selecting a third country's court, is the award's international mobility: the primary advantage of international arbitration is enforceability [6] . It can be easily enforced, with limited defences by the losing party, almost anywhere around the globe, due to the equally phenomenal success of the New York Convention [7] .

Some actors in the international legal community and its current players, companies and their representatives, probably highly value a certain degree of procedural flexibility which is inherent in arbitration. This is one of the main driving forces in domestic arbitration, where the two distinctive advantages in the international scene mentioned above do not concur. Domestic arbitration, however, is thought to be less prevalent in relation to domestic contracts than their international equivalents. Sophisticated business parties doing business in the same country frequently leave the adjudication of possible disputes to their ordinary courts, particularly in countries were courts offer a reliable and reasonably expeditious outcome. To the writers knowledge there are no statistics available on the comparative use of arbitration and courts as adjudicating fora, either at the stage of writing or entering into commercial contracts, or in actual disputes. We do have valuable surveys [8] but they are drawn from among a small universe of players and in limited geographical areas.

The literature offers several other reasons for the success of international arbitration. Procedural flexibility is often signaled as the first of the "additional reasons":

> "So long as the parties are treated fairly, an arbitration can be tailored (…) rather than having to be conducted in accordance with fixed rules of civil procedure" [9] . This may be surprising. In most advanced jurisdictions the existence of fixed rules of civil procedure is one of the ultimate guarantees that

parties are, indeed, treated fairly [10] . Why should this be different in arbitration? Essentially, because since ancient times, many systems of law have recognized the autonomy of the parties in certain situations to contract out of the established court system, and therefore of its rules of procedure. The literature on the origins of arbitration is immense. The institution stems from the will of the parties to depart from established courts as a means of resolving their disputes, and the recognition of such will in the national legal order. This could be either by submitting their disagreement to a person whose expertise or judgment they trust [11] , frequently allowing him or her to adjudicate ex aequo et bono [12] , with no reference to legal rules to resolve the merits of the dispute, or to an expert in their specific trade, perhaps appointed by an association of merchants. In such situations, the adherence to a detailed rule book of procedure was probably unnecessary, although references to universally applicable rules of procedure do exist [13] . It seemed sufficient to apply the arbitration rules of the seat of the arbitration as a basic framework for the arbitration procedure.

The advent of international arbitration in the twentieth century proved this situation to be unsatisfactory, and progressively arbitration freed itself from most constraints derived from national rules of procedure. However, the explosion in arbitration as the means of choice to resolve disputes arising from international contracts has made the institution depart from its original setting. We no longer have parties choosing a trusted third person, or one selected by the board of the association of a closed number of traders, who will act under a more or less detailed legal system of arbitration. Parties today choose a loosely written set of rules from one of the several institutions administering international arbitration, which will provide them as well as arbitrators –if they do not choose them themselveswith certain individuals whose expertise is generally closer to that of a generalist judge than a specialist in their particular trade. It is, therefore, no wonder that the arbitral process has become judicialized, and accordingly the arbitrator in international commercial arbitration is required to proceed judicially [14] . His or her functions are today in most circumstances almost indistinguishable from those of a judge. Judicial proceedings are constrained under the rules of procedure of the forum which offers the parties a high degree of predictability in how the process will be conducted and affords them a blueprint on how to organize the defence of their case. Arbitration, however, is only constrained by a generic invocation of due process with no guidance on how this requirement is to be met. This leaves the conduct of the proceedings to the parties' agreement, and if no agreement can be reached, to the arbitrator's decision. The lack of predictability resulting from such a situation has met with important criticism, both from the commentators' viewpoint [15] , and more generally from practitioners [16] . This paper will discuss how the inherent judicialization of today's international arbitration may require a greater degree of predictability in the conduct of the procedure than the one resulting from the bare concept of "due process", and how in response to that need there is an emerging body of rules which today are mostly not law in themselves, but are developing into a standard against which due process will be judged. A final word in this introduction: It has been discussed [17] that the term "due process" has a specific meaning in some national legal systems and that in international arbitration a more neutral term like "procedural fairness" should be used. However, the term is that most commonly used when discussing the Model Law and the New York Convention, and in the literature on arbitration:

> "the term (...) refers to a number of notions with varying names under national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called " *principe de la contradiction* " and equal treatment" [18] .

It is this meaning that should be understood in this paper.

2. THE PATH TOWARDS THE AUTONOMY OF THE ARBITRAL PROCEDURE

2.1 The lex loci as applicable to arbitral procedure

A rbitration exists because national laws recognize the validity and enforceability, first, of the parties' agreement to have their disputes resolved by a means other than the national courts, and second, of the award that the arbitrators will render. This is certainly to the extent that each of them so determines, subject to international conventions to which the relevant State is a party. Arbitrators lack enforcement powers and therefore arbitration relies on national laws and national courts to be effective.

T he English Court of Appeal has stated that arbitration is not "floating in the transnational firmament, unconnected with any municipal system of law" [19] . The connection between arbitration and national courts through the provisions of the relevant national arbitration law is usually determined by the seat or place of the arbitration [20] . This proposition follows the so called "seat theory" which is the basis of the Model Law [21] . The situs, synonymous to the seat – a modern term, which implies a less physical link or the place – the most commonly used term of the arbitration, is a crucial element in international arbitration. It is present in most arbitration laws, institutional arbitration rules and international conventions. Sometimes is referred to as "the place of arbitration", sometimes with a reference to "where the award was made" [22] , but is rarely defined.

The seat or place of the arbitration is the geographical location which confers a legal nationality on an arbitration and its award. As leading commentators have stated "it is the territorial link between the arbitration itself and the law of the place in which arbitration is legally situated" [23] .

It has been graphically written that

> "when parties select an arbitral situs, they are purchasing a package. The services thus bought include both mandatory and non-mandatory procedural rules, a given level of court intervention, and "probably" recourse to some kind of judicial review through motions to vacate or confirm a final award. The price: a commitment to abide by the procedural rules of the situs. No payment, no enforcement." [24]

This means that to the extent that mandatory national rules of procedure applicable to arbitration lay down precise provisions, they have to be obeyed [25] . This would on the one hand increase the predictability of the procedure to be followed in the arbitration, but on the other hand, recourse to national courts for breaches of procedural matters might jeopardize one of the goals of arbitration which is the finality of its results. In the tension for efficiency in arbitration between finality and fairness, [26] it would be a national system of law which would impose its views in an international arbitration.

2.2 The path towards autonomy

However, this equivalence between the need for an arbitral award to follow the procedural rules of the legal order of its situs and the enforceability of such an award, was seriously eroded when the New York Convention came into effect, and by several developments in various national systems. These developments, both judicial and statutory, allowed parties to waive all appeals to national courts in matters related to international arbitration [27] .

As has been stated in Chapter I of this paper, one of the two reasons for the success of arbitration as the means of choice for resolving international disputes is the enforceability of arbitral awards in a country different from the one where it was made. The first multilateral convention to that effect was the Geneva Convention on the Execution of Foreign Arbitral Awards [28] . When laying down the requisites to obtain recognition and enforcement of arbitral awards it stated as necessary (Article 1 (d)):

> "That the award has become final in the country in which has been made, in the sense that it will not be considered as such if it is open to [challenge in national courts] or if it is proved that any proceedings for

the purpose of contesting the validity of the award are pending."

This, therefore, gave the national courts of the country where the award was made, the final say on the ultimate enforceability of such awards. The parallel Geneva Protocol on Arbitration Clauses [29] provided in its provision (2)

> "that the arbitral procedure shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place".

While those provisions could well have enhanced the predictability of the procedure to follow in the conduct of arbitrations, it led to serious obstacles to having international arbitration as a truly neutral way of solving international disputes which, as stated in Chapter I, is the other driving force of its success today.

Against this experience, still prevalent in the fifties [30] , the New York Convention changed the course of international arbitration. The crucial word in its Article V (1) (e) is that

> "recognition and enforcement of the award may be refused (…) only if (…) the award has not yet become binding on the parties, or has been set aside or suspended [by a competent national authority]" [31] .

It therefore leaves to the discretion of the court of enforcement to give effect to an award which has been set aside by the courts of the country where the award has been made. Such provision lays the ground on a world wide scale for an effecti v e delocalization of arbitral awards from the rules of procedure in arbitration which may exist in the different countries where an award may have been made.

2.3 Recognition of the existence of an arbitral legal order

Courts in different countries, while giving effect to the New York Convention [32] , vary in adopting a territorial approach. In doing so, they grant deference to the decisions of the courts of the country of origin, or a delocalized approach, which offers a more accurate interpretation of the provision in the New York Convention [33] . There are several well known precedents particularly from French courts [34] , initially around the concept of "lex mercatoria", i.e. a-national rules of law to be applied on the merits of the dispute [35] , heralded as the recognition of an autonomous international arbitration legal order [36] . The French Court de Cassation has stated that

> "an international award is not integrated into the legal system of that State [where the award was made], so that it remains in existence even if set aside" [37] ,

and that

> "an international award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought" [38] .

The degree to which courts in other jurisdictions follow this approach varies, and perhaps is not really required in most cases, because parties, by avoiding –if they caninhospitable venues for arbitration, or even, if so allowed, by waiving any recourse to local courts, as discussed below, can minimize the risk of non-enforcement because of procedural or other constraints of local arbitration laws [39] . As a consequence of this situation, most national arbitration laws in matters of procedure have evolved in a manner which greatly diminishes the likelihood of a clash [40] . The influence of the Model Law in the national laws of the most important venues for arbitration is immense. As leading commentators state,

> **“** the minimalist approach and the primacy of the principle of party autonomy, as embodied in the Model Law, have now been recognized in all modern arbitration laws” [41] **.**

The Model Law simply states in its Article 18, mirroring the equally laconic wording of the New York Convention [42] that “the parties shall be treated with equality and each party shall be given full opportunity of presenting his case”. It further provides the autonomy of the parties to agree on the procedure to be followed, and failing such agreement, leaves total discretion to the arbitrator – subject to the provisions of the law, e.g. Article 18 to conduct the arbitration as he or she thinks appropriate, including all matters related to evidence [43] . This is a de facto total isolation of the arbitration in relation to hypothetical local rules governing the proceedings [44] .

As a further step on delocalization of international awards, some countries specifically allow parties to an arbitration to waive any appeal to its national courts [45] , thus isolating from the outset the arbitration from the national courts of the situs. This is somehow encouraged by the UNCITRAL Arbitration Rules [46] , and included in the arbitration rules of some institutions like the Singapore Arbitration Centre [47] .

2.4 The current mantra: bespoken procedure vs. one size fits all

The efforts to make international arbitration truly international, neutral, detached from the application of the rules of procedure of the country of its seat obey also to the honor another of the features of arbitration. As mentioned in Chapter I of this paper, its flexibility is perceived to be the first “additional” reason to make arbitration an attractive alternative to litigation. While national court procedures set rigid rules, with little or no areas in which the judge can, at his discretion, even with the agreement of the parties, move away from the structures of the civil procedure rules of courts, the structure and procedure of every arbitration is different and will vary according to the characteristics of the case [48] . There is no set of rules on written or oral submissions, their sequence and their numbers, on legal privilege, on the how and when of document production, on witness and expert witness testimony or on ethics in relation to the proceedings. The current prevalent view is that

> **“** it is the essence of international arbitration that the procedural rules and schedules of each arbitration are designed in light of the specific needs and requirements of the parties and their particular dispute” [49] **,**

or, in more familiar terms, “arbitration can be “custom-tailored” to suit the parties’ needs and desires” [50] . In the absence of specific agreement between the parties, which can rarely foresee all the circumstances of a procedure, as was already highlighted in the works leading to the New York Convention [51] , this leaves the arbitrator in the position of a lawmaker: “L’arbitre, surtout l’arbitre international, est en matière de procédure, son proper législateur” [52] . This might sound a bit contrary to the principle of separation of powers, and even worse, when in the name of flexibility, those rules are determined after the procedural question arises: ex post facto rule making [53] . In any case, as a law maker, the arbitrator is subject to “constitutional” constraints. Those constraints will be discussed in the following pages.

3. DUE PROCESS AS A CORNERSTONE OF INTERNATIONAL ARBITRATION

Arbitration is a means allowed by national laws since ancient times for parties to depart from the established court system to solve their disputes. In the previous paragraphs we have described how international arbitration has departed from the constraints of national law towards a situation that some commentators describe as an "arbitral legal order" where the arbitrator is his or her own lawmaker. However, even with its own rules, arbitration is just a form of procedure where essential, natural principles of dispute resolution have to be followed [54] . A senior English judge forcefully stated:

> "Arbitration has this in common with the court system: both are a form of dispute resolution which depends on the decision of a third party. Justice dictates that certain rules should apply to dispute resolutions of this kind. Since the state is in overall charge of justice, and since justice is an integral part of any civilized democracy, the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as pubic tribunals" [55] **.**

The degree of pre-established rules that have to be set in relation to the arbitral procedure will be discussed in the following pages.

3.1 The Model Law and national laws

As has been stated, the Model Law sets out a minimalistic approach in relation to the arbitral procedure:

> "Failing (...) agreement [of the parties] the arbitral tribunal may, subject to the provisions of this law, [in this context: treat the parties with equality and give them full opportunity of presenting their case] conduct the arbitration in such manner as it considers appropriate (...) include[ing] the power to determine the admissibility, relevance, materiality and weight of any evidence" [56] **.**

Most modern arbitration laws, particularly those following or inspired in the Model Law, provide as grounds for challenging an award made according to its arbitration laws the situation where the party has not had a full [57] , a sufficient [58] , or a reasonable [59] opportunity to present its case, or was unable to present it [60] . Others give more details: "The principles of the presence of both parties to the dispute, equal treatment of the parties, impartiality of the arbitrator and freedom of decision, shall always be respected" [61] ; or refer to the principles of equality, the right to be heard, and contradiction [62] . Others, finally, simply refer to violation of the "principle de contradiction" [63] or the right to be heard in adversarial proceedings [64] or refusing to hold a hearing or to hear evidence pertinent and material to the controversy [65] . However, the application of the due process principle to the actual arbitral procedure needs to be crystallized in relation to specific issues. Evidence is foremost. It further has to be balanced against other evidentiary rules like client-attorney privilege. And above all, in international arbitration, it has to take into account the different views of the participants, rooted in their own legal traditions and the rules of their own system, leading to the conclusion that "the core rules of evidentiary procedure, fairness and equality, require more particular standards" [66] .

I n practice, it has been left to national courts to determine on a case by case basis, what constitutes due process for purposes of an arbitration [67] . Most have taken the view that only "serious or egregious" [68] procedural failings may be grounds to set aside an award. The essential requisites of the right to be heard in international arbitration which have been developed by national courts in several countries, be it in direct application of article 18 of the Model Law or similar national provisions have been listed as follows [69] : (a) adequate notice of the proceedings, including notice of the major steps in arbitration; (b) adequate notice of the claims, evidence and legal arguments of other parties to the arbitration; (c) representation by counsel of the party's choice (except

where specifically waived) [70] ; (d) reasonable time to present a party's claims or defences, evidence and legal arguments, including, in most cases, at an oral evidentiary hearing in the presence of the arbitral tribunal; (e) reasonable time to prepare claims or defences, evidence and legal arguments, including responses to the claims or defences, evidence and legal arguments of other parties to the arbitration; (f) an impartial and independent tribunal; (g) a decision based on the evidence and legal arguments submitted by the parties, and not upon ex parte communications or the tribunal's independent factual investigations (except where specifically agreed to the contrary); and (h) protection against "surprise" decisions, not based upon factual or legal grounds that a party had no opportunity to address.

For the purposes of this paper, it should first be noted that as the author of the list states,

> "these protections are limited to the safeguards which are fundamental to a fair adjudicative process, reflecting the minimum procedural rights necessary to enable a party to present its case to an adjudicative decision-maker in an adversarial process. These safeguards are not the protections necessary for a flawless, a good, an efficient, or even a merely satisfactory arbitral process; they are only those guarantees that are absolutely necessary to provide a minimally fair adjudicative process [71] **"** .

Secondly, that the first elements of the list, particularly (a) and (h) reflect the need of predictability in the process and, signalled as a "minimum" standard, the further development of arbitration might require this to be enhanced to fulfil parties expectations and a better adjudication.

3.2 The New York Convention and its application by national courts

The New York Convention gives in principle full faith and credit (i) to the agreement to arbitrate -provided certain forms are met -, and (ii) to the arbitral award made in a different State (subject to possible commercial nature and reciprocity reservations).

It is well known that the grounds upon which a foreign award may be refused recognition and enforcement are limited [72] . Among the grounds of refusal under the Convention, reproduced in slightly different wording in the UNCITRAL Model Law [73] , mostly are purely procedural in the sense that its validation or not would not need the enforcing court to examine the intrinsic content of the award, its full content [74] . Other grounds have a purely legal content: arbitrability and public policy– arguably, international public policy according to the laws of the court of enforcement.

It is well established that – with some residual exceptions in common law countries the enforcing court is not allowed to review the merits of the award [75] . The wording " *otherwise unable to present his case* " is the only means whereby such court is entitled to verify that the basic principles of due process are met [76] . If this is the case, on the assumption that all formal procedural aspects of the award are correct and that it does not encroach – on the very limited extent permitted under the Convention with the laws of the country of enforcement, the award will merit full faith and credit. Generally, it has been stated that the ability to present one's case is the "most fundamental due process rule" [77] . More specifically, in relation to this defence, a US Appellate Court has stated: "(…) basically corresponds to the due process defence that a party was not given the opportunity to be heard "at a meaningful time and in a meaningful manner. (…) An arbitrator must provide a fundamentally fair hearing, (…) one that meets "the minimal requirements of fairness" – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator" [78] .

T he following question is where the standard of due process is to be found, what would be a fair hearing. Is it a national law, and if so, which one, or is there an autonomous source, like arbitration rules, or a legally binding custom of international commercial arbitration? Or is it a combination of both?

The primary answer to the question analyzed here is that the courts in the enforcing state look to their own arbitration law to the extent that it provides answers to the matter in relation to the arbitration procedures followed under the application of such national law. This should not entail an expansion of the grounds for rejecting recognition and enforcement which are not permitted because of the prevalence of international conventions over national laws [79] .

Those standards, laid down for internal challenges to awards made in their home jurisdiction, are those which the court of enforcement would apply, as stated by a US appellate court:

> "[The New York Convention] "essentially sanctions the application of the forum state's standard of due process" [80] .

Similarly, in the UK,

> "an English court exercises control over the enforcement of arbitral awards as part of the lex fori, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law. For the purposes of the present dispute, that means section 26 of the Arbitration Act, 1950" [81] .

Although this case is on public policy and the enforcement of a domestic award under the previous English Arbitration Act, the principle has been applied to the standards of due process that are applicable when enforcing a foreign award:

> "It is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see e.g. *Adams v Cape Industries [* 1990] Ch 333 [82] " .

Some courts, however, have taken a general approach, without express reference to their own standards of due process in arbitration:

> "Guaranteeing due process requires, also in arbitration, that on the one hand the party may give its view in respect of the subject matter of the case and the legal situation, and on the other hand that the arbitral tribunal takes note of the arguments of the parties and takes them into account for its decision, in so far as relevant" [83] .

National courts have frequently been asked to adjudicate on challenges to enforcement of foreign arbitral awards on procedural grounds. However, those have rarely been successful, except perhaps in England [84] . There are scarce precedents, if any, of discussion on whether the procedure adopted by the arbitrators, or the lack of such adoption, deprived a party of its fundamental right of defence [85] . The Swiss Supreme Court has explicitly denied that the requirement of due process required a code of arbitral procedure:

> "It should be underlined that procedural public policy will constitute only a simple exclusion provision, namely, that it will merely have a protective function and will not generate any positive rules. This is because the legislature did not desire that procedural public policy should be extensively interpreted and that there should arise a code of arbitral procedure to which the procedure, as freely selected by the parties, should be subjected." [86]

I s this the end of the story? No need of a pre-determined arbitral procedure? This answer would probably be unsatisfactory, and denied by the facts. To quote a leading practitioner:

> "Yet the rules of procedure and the practices applied by the adjudicating body may have every bit as much effect on the outcome of a dispute, and on the rights of a party, as the substantive law" [87] **.**

The following pages will discuss whether indeed procedural uncertainty is consistent with due process, and the efforts undertaken by the international arbitration community to overcome this.

4. THE NEED FOR PREDICTABILITY

4.1 Legal theory

The discussion of the constitutional aspects of arbitration is beyond the scope of this paper. Most constitutions proclaim the due process principle, as do international texts and conventions [88] . It is settled that an agreement to arbitrate is a waiver of the entitlement to a public hearing in a court of law and that an arbitral tribunal is not a court of law.

I s it also a waiver to have it adjudicated following a pre-determined procedure? As an example, the Spanish Constitutional Court has repeatedly stated that when parties exercising their free autonomy choose arbitration, they are not entitled to the specific procedural guarantees afforded by Article 24 of the Constitution (effective judicial protection) [89] , and do not have access in the arbitral procedure to the protection of the Constitutional Court for breaches of due process [90] . However, an arbitration agreement while being a valid waiver to the right of access to the courts, to the right to have the dispute adjudicated by a predetermined judge, surely is not a waiver of the right to a fair hearing. Is it a valid waiver to a predetermined procedure, and if so, to what extent? The answer to this question will probably lead us back to the different national arbitration laws which in each jurisdiction have enshrined the essential characteristics of due process in the manner previously discussed.

There is another aspect to be considered in the European context. It has been stated that

"when considering a challenge to an award on grounds of a violation of 'due process', courts in Europe may well have regard to the safeguards contained in Article 6 of the European Convention on Human Rights" [91] **(** hereinafter the "ECHR")".

While a voluntary arbitral tribunal is not a "tribunal" within the meaning of such provision [92] , the European Court of Human Rights has held that while an arbitration agreement is a valid waiver to a "right to a court [93] ", it is considered a partial waiver of certain rights under it, but not of all of them [94] . It is unclear given the system of the ECHR, which applies to the relations between individuals and each contracting State, which rights can be validly be waived and how this applies to arbitration [95] . It has been maintained that

"all other [than access to court and a public hearing] procedural human rights requirements apply in arbitration unless they are [expressly] waived" [96] **.**

While the freedom of the parties to validly exclude their disputes from the ordinary court system is fully recognized, according to the EHR Commission

"this does not mean that the respondent State's responsibility is completely excluded (…) as the award had to be recognized by the [German] courts and be given exe **c** utory effect by them. The courts hereby exercised a

certain control and guarantee as to the fairness and correctness of the arbitration proceedings" [97] .

In relation to the conduct of the proceedings it would seem that while the principle of equality of arms cannot be waived, it simply "implies that each party must be afforded a reasonable opportunity to present its case – including evidence under conditions that do not place it at a substantial disadvantage vis-à-vis his opponent" [98] . It does not seem either that the standards laid down under the ECHR differ from those discussed in relation to the Model Law and the national arbitration laws in most of the usual venues for arbitration. We can conclude from this very elementary comment on constitutional law applicable to arbitration that it essentially is content with laying down general principles of due process and that predictability of the procedure is not specifically mentioned in precedents.

Having said that, procedural uncertainty has been much discussed in the last few years, and several awards have been set aside or annulled or redirected to the arbitral tribunal by "surprise" decisions of arbitrators. A certain consensus seems to be emerging on the need to have the whole process made more predictable.

4.2 Views from the inside

Some voices in the international arbitration community have raised their concern since over the progressive popularity of arbitration in last third of the twentieth century in relation to the (un) predictability in international arbitration, both on the merits of the disputes and on the uncertainties in the arbitration procedure [99] . Its deregulation has deep roots. For the works preparing the New York Convention it was already stated that "No agreement could foresee all possible procedural questions which might arise" [100] . It is repeated nowadays that the problem with predictability is that it is impossible to foresee at an early stage of the proceedings which of the most appropriate procedural rules will be relevant, and by agreeing on those in advance, arbitration is fit into a strait jacket thus losing the advantage of arbitration versus court proceedings in that arbitration is more responsive to the needs of the case [101] . The classical view is developed very recently by a leading commentator with those words:

"Commentators sometimes urge that "a formal system of procedure designed specifically for arbitration would be a good idea". That suggestion contradicts some of the basic objectives of the arbitral process, which is selected by commercial parties precisely because it is informal, tailored to specific cases, developed jointly with the parties and flexible. Indeed, this approach would impose less flexible, more formal and more arbitrary rules, in a manner redolent of Procrustes' bed, on parties who believed they had escaped precisely this result by agreeing to arbitrate. This result **w** ould be particularly ill-advised given the wide range of different disputes and procedural expectations that exist in international commercial settings". [102]

Yet, even the most ardent advocates of procedural flexibility recognize "the need of the parties to know the parameters in which present their case" [103] . This is precisely the link between predictability and due process. Procedural formality is often another term for due process [104] . As every practitioner knows, the blueprint of the procedure is essential in order to properly "be heard", "to be able to (properly) present his case", in the words of the New York Convention. Most litigants anticipate a measure of ordered procedure as a pre-requisite to equal treatment and due process [105] . It has been submitted that "arbitration has been pressed into service to create more level litigation playing fields and to reduce the risk of random results" [106] and more particularly in the means of evidence, and that "(parties in international commerce) also seek a process based on uniform principles (…) without misunderstandings or surprises" [107] . This applies not only to the situations that may stem from litigating in a foreign court, which is what the quote referred to. It is submitted that it also applies to many instances in international arbitration, including not only rules of evidence in its narrow sense, but also the relations between counsel and their clients including rules on privilege [108] , and the conflicts of interest and rules of ethics of the arbitrators.

A recent survey among a wide constituency of those involved in international arbitration [109] fully endorses this view: the vast majority of those who had served as arbitrators or arbitration counsel considered proof as sometimes, frequently or always determinative of the outcome of the case. Yet at the same time very few respondents considered that arbitral tribunals frequently or always articulate burden of proof in advance. This appears as a substantial gap. The survey's results in relation to document production also recommend that the document disclosure process should be agreed on by the parties or failing such by the arbitrators from the outset of the procedure. This survey concludes on this matter that more precision is needed in relation to rules of evidence in international arbitration.

There is an important issue of legitimacy as well. Ordinary court proceedings are public: their potential users, observers, the media, have access to the court room and see under their eyes how justice is administered. Arbitration, which historically has played a significant role in upholding the rule of law [110] , and is today the primary adjudicatory system of international disputes, is essentially private, and lacks the control of publicity. It is a primary justice system which has little accountability to its constituency [111] . It is submitted that it has to create the appearance of due process even with more rigour than in ordinary court proceedings [112] . When discussing the advantage of establishing in the courts as soon as possible, a clear, general principle of decision and thus achieving predictability, a distinguished Justice reminds us that "uncertainty has been regarded as incompatible with the Rule of Law" [113] . As has been empirically evidenced, people perceive the institutions, their decisions and rules as legitimate when they view adjudicators as having provided procedural justice, and a key element of such procedural justice is providing clear guidance about applicable standards [114] . It is likely that the public would disapprove of witnessing arbitrators setting norms for specific procedural questions on an ad hoc basis once it is clear which side will be favoured by the adoption of such rule [115] . In that sense, a former President or Chair of the German Institution of Arbitration, of the LCI and the Iran-US Claims Tribunal states that

"No matter whether it is by agreement of the parties or by procedural decisions of the arbitrators, it is highly important that the 'Rules of the Game' be identified at a very early stage of the procedure. This is particularly so if the parties and their lawyers come from very different legal traditions and therefore might expect very different methods of conducting the arbitral procedure. Thus, after getting the necessary input from the parties, the arbitrators should clearly identify all major aspects of the procedure, be it in the Terms of Reference in the ICC Rules and/or in detailed procedural orders" [116] .

This view is shared by prominent arbitration institutions. The Handbook of the American Arbitration Association states that

"While one can argue that giving the arbitrator's flexibility to determine the procedural rules helps fulfill a primary goal of arbitration, efficiency is not always obtained and often fairness is sacrificed in the name of efficiency, or so it may seem. It is submitted that a balance between predictable procedures and arbitration flexibility is needed to avoid the perception that fairness has been compromised" [117] .

The view that predictable and detailed procedural rules are needed to fulfill the requisite of due process is clearly indicated.

4.3 Institutional rules

Yet surprisingly, or perhaps not [118] so the arbitration rules of most international institutions do not address those issues. Most of them [119] provide as the Model Law that "parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" [120] –subject to mandatory provisions, and if the arbitrator fails to honor such a choice, the award may be set aside [121] . However, parties in most

arbitration agreements, or, to a greater extent, in arbitration clauses, refrain from setting out procedural rules in any detail, if they deal with the issue at all. This is probably because at the time of contracting they regard a dispute as a distant possibility and most likely hope it will not occur. In sharp contrast, most substantial commercial agreements among corporations contain precise and detailed procedural rules on the determination of price adjustments, or on the procedure whereby claims under the agreement will be dealt with, what is meant by a party's knowledge of certain facts, etc. Very few agreements follow suit in the arbitration clause. It may be due to the fact that price adjustments will certainly occur, and it is more likely than not that there will be minor or not so minor claims among the parties, but hopefully they will be solve –and they normally arewithout resorting to the courts or to arbitration, depending on the venue chosen. The fact that transactional lawyers have little knowledge or experience in arbitration and leave these niceties to their litigation colleagues if and when the matter turns sour, may also have an influence on the situation.

In the absence of such detail as regards arbitration procedure, most modern national laws follow the Model Law: "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence" [122] . The arbitration institutions essentially follow suit [123] . They generally subject such discretion to the agreement of –or in some cases in consultation with the parties. They frequently mention various elements related to due process, in general terms (e.g. equality, fairness, right of the parties to be heard and respond to the other party's position) and sometimes they make reference to applicable mandatory rules. While many rules do set up a basic framework of the development of the proceedings, and particularly the rules of the LCIA have clear provisions in this regard [124] , very few go into details about the production of evidence, rules on ethics, or of the duties of the representatives of the parties –here again the LCIA is an exception with the recent inclusion of binding albeit broadly drafted guidelines in that respect [125] . The lack of detail on the rules of the institutions is approved by leading commentators as "quite proper" [126] , as a self evident truth.

Against this background, it is tempting to state that the game is over. In the use of their autonomy, parties choose to waive their right to a predetermined procedure – unless they expressly include it in their arbitration agreement or clause. As has been said, "the indeterminacy of the procedural régime in international arbitration is the price parties pay for their procedural autonomy" [127] . In ad hoc arbitration if referring to UNCITRAL rules, the guidance is vague indeed [128] . If such a choice is not made, it totally falls into the hands of the arbitrators. If parties choose institutional arbitration, they get a set of more or less –probably lessdetailed rules addressing the conduct of the proceedings [129] .

Yet the institutions have not been insensitive to the need in arbitration to have the procedure defined at an early stage [130] . The ICC which already made the "particulars of the applicable procedural rules" [131] , a requirement of the Terms of Reference, now also prescribes that the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures in order to adopt them, and refers to the Case Management Techniques annexed thereto [132] . The LCIA has introduced a new rule [133] which simply encourages the parties and the Arbitral Tribunal to make contact not later than 21 days after the formation of the tribunal to agree on joint proposals for the conduct of the arbitration. The AAA international rules also have been amended providing that a preliminary hearing "should" be scheduled as soon as practicable after the appointment of the arbitrator[s] where the arbitrator and the parties "should be prepared" to discuss and establish a pro **c** edure for the conduct of the arbitration. [134] While the current provisions fall short of prescribing that the arbitrators adopt detailed rules of procedure from the outset, there is a strong trend signaling that they indeed should do so in order to avoid surprise decisions. Otherwise, they might consider themselves entitled to adopt such decisions under the discretion conferred upon them by statute and the rules themselves. Leading commentators point out that a fairly detailed "Procedural Order Nº 1" is nowadays an almost standard feature in any arbitration [135] , which probably signals that the arbitrators feel bound to produce it. A

different matter is whether those Order follow a similar pattern, whether they refer to soft law or go ad hoc, sometimes excessive detail [136] .

4.4 The reaction of national courts

As has been discussed in Part 3 of this paper, national courts have been quite consistent in resisting the establishment of a pre-determined procedure in an arbitration when applying the New York Convention grounds for refusal of enforcement. A similar situation results in most jurisdictions in relation to internal challenges to awards made in their territory. English judges [137] have consistently referred to the Report on the Arbitration Bill [138] when examining challenges to awards

under Section 68 of the Arbitration Act, and the test of a "serious irregularity". Two statements in the Commentary are particularly relevant in this context: "The test [of substantial injustice] is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate, not to litigate", and "Having chosen arbitration, the parties cannot complain of substantial injustice, unless what has happened cannot in any way be defended as an acceptable consequence of that choice". Reference is generally made to the fact of whether the procedural irregularity has caused a substantial injustice [139] . However, in some cases they have held that the arbitral tribunal shall communicate to each party the way in which it intends to conduct the arbitration so that each party has the opportunity to prepare appropriately [140] . The Hong Kong Court of Appeals [141] allowing the appeal against the first instance judgment setting aside an award, states that only a "serious and egregious" procedural violation by the arbitral tribunal could lead to an award being overturned.

Yet, national courts have been ready to step in and annul awards when arbitrators have surprised the parties –let's say, the losing partyby bringing into the award legal arguments or questions of fact not properly discussed in the proceedings: such determination should never come as a surprise to the parties [142] There are many examples in various jurisdictions: In England it has been consistently stated that procedural unfairness occurs when an award is decided on the basis of a point which was never raised by either party, and many awards have been set aside on these grounds [143] . The sentence that "nor is it right that a party should first learn of adverse points in the decision against him [144] " may be specifically quoted. In turn, the Cour supérieure de Québec [145] and the Paris Cour d'Appel [146] have held that by imposing a remedy that neither party had invoked, the arbitral tribunal had violated the audiatur altera pars rule, and set aside the award [147] . Those precedents certainly relate to the law on the merits of the award and the right to be heard. However, it has been submitted that the award will be set aside "if the application of that principle [iura novit curia] has a negative impact on the foreseeability of the arbitral award, to such an extent that it would constitute a violation of the right to be heard" [148]

5. THE EMERGENCE OF A PROCEDURAL LEX MERCATORIA

5.1 The eclosion of an arbitral soft law

While the theoretical aspects of the autonomy of the arbitral procedure, predictability and the relevant legal and court precedents, have been discussed in the previous pages, it is now time to look at whether the different constituencies in the international arbitral community have indeed been pro active in offering solutions to the perceived disfunctionalities of the current state of affairs. The answer is very short: Yes, very proactive. [149]

T he arbitral soft law is formed by an extensive number of rules and guidelines published by various associations and professional which are sometimes called "non national" instruments [150] , thus stressing their origin and their non enacted nature. There will not be an attempt to summarize or comment on their contents in this paper. This proliferation of solutions which essentially cuts into the organization and general

conduct of arbitral proceedings, ethics and evidence, emerges in fertile and mature ground. As a leading commentator states [151] ,

“while most systems recognize some general concept of ‘due process’ or ‘fairness’, the way such goals are achieved, and the actual procedures applied, differ widely between countries and between legal systems. It is in the arena of international arbitration that those differing procedures and the attendant expectations of the parties, have most often come face to face and where lawyers and arbitrators have had to find practical solutions. As a result, there has over the years been a steady evolution, whereby certain procedures and practices, some taken from one system and some from another, often with an element of compromise, have come to be commonly accepted in the context of international arbitration. This has led to a certain degree of standardization in the practice of arbitration, ‘denationalized’ from any single legal system, **w** hile still leaving considerable flexibility and discretion in the hands of the arbitrators”.

This de nationalization “cuts right across past and present barriers between different procedural philosophies and legal systems [152] ” It has its foremost expression in rules or guidelines which, unless agreed upon by the parties or ordered by the arbitral tribunal are not binding as such upon the arbitral institutions, arbitral tribunals or national courts. Nevertheless they carry, to varying degrees, a wide authority and acceptance which cannot be ignored.

5.2 The UNCITRAL and the IBA Rules and Guidelines

The UNCITRAL Arbitration Rules [153] which are arguably not in the realm of soft law, since they were adopted by the UN itself, are frequently agreed by the parties in ad hoc arbitration. They are similar in their scope to the institutional rules of the different arbitral institutions; in fact some of them have adopted such rules for their own arbitrations [154] . As many institutional rules, they laid down the basic framework of the procedure and set out quite a few of the elements necessary in the conduct of the proceedings. Nonetheless, they do not go into much detail on such matters which have given rise to more discordance like the details in evidence, and ethics of arbitrators and counsel in the proceedings [155] . This has needed further elaboration and at least in the European scene the most successful of such procedural standardization are probably the different rules and guidelines issued by the International Bar Association on those matters. Is thought that in the U.S. the Code of Ethics for Arbitration in Commercial Disputes jointly issued by the AAA and the ABA sets the applicable standard.

Those instruments all expressly state, using similar wording, that they do not intend to override any applicable laws, institutional rules, or agreements among the parties. They further state that they intend to supplement such laws and rules, either as guidelines, or as agreement among the parties, or by means of a procedural order of the arbitrators [156] .

The IBA Rules for Taking Evidence in International Commercial Arbitration since their 1999 edition –the current amended version was adopted in 2010have gra **d** ually become the standard of procedure in international commercial arbitration [157] . The variety of legal traditions embodied in such rules, is noteworthy in the context of this paper, as is their level of detail. This is in contrast with the basic principles contained in the UNCITRAL Arbitration Rules and in the provisions of the rules of most international institutions discussed in part 4.3 of this paper.

All those instruments are widely known, studied, published and commented [158] . In the following paragraphs we will attempt to trace their effective use and the intent of their use, and whether any legal consequences can be inferred from such use.

5.3 Recognition of the above-mentioned instruments by (a) arbitral institutions and tribunals, (b) in legislation and (c) by the national courts.

a) There are very few studies or statistics on the actual adoption of the various expressions of arbitration soft law by arbitral tribunals around the globe. In relation to the IBA Guidelines on Conflicts of Interest in International Arbitration, the ICC itself [159] published a study on their application by the ICC Court of Arbitration. The article stresses that in briefing the Court the Secretariat points out which article of the Guidelines may be relevant, and in 106 out of 187 cases decided, the situation had a reference to one of such articles. However the paper makes clear that "such references are for information only and do not bind the Court. Nor do they mean that the Court is applying the IBA Guidelines" [160] . The LCIA frequently refers to such Guidelines and some divisions hereof have stated that they "reflect actual practice in significant parts of the arbitration community [161] ". Commentators have stated that "from the standpoint of the institutions, the IBA General Standards are an acceptable enunciation of independence, impartiality and disclosure requirements [162] ".

Soft law and more precisely the IBA Rules on Evidence as a standard are to be found in many actual awards [163] . The importance has been recognized inter alia in a well known International Centre for the Settlement of Investment Disputes (ICSID) award:

> "The IBA Rules are used widely by international arbitrators as a guide even when not binding upon them. (They) reflect the experience of recognized professionals in the field and draw their strength from the intrinsic merit and persuasive value rather than from their binding character [164] **"** .

This is probably the most widely held view: use, respect, and simple guidance. It is submitted that this is a step forward in our search for predictable rules of procedure, albeit its non binding character as enunciated in this and many other awards and commentators probably fall short of crystallizing what some observers think that due process requires.

In another ICC sponsored study limited to Latinamerica [165] , but with respect to the actual awards, the authors reviewed 35 recent cases, all of a transnational nature. The IBA rules on evidence were adopted in the majority of cases. In most cases, the majority of the arbitrators acting in such proceedings were experienced arbitrators. Furthermore, quite demonstrative of their weight, in 21 of the cases the IBA rules were referred to in procedural orders without the parties express agreement on their use. In most cases they were applied directly as such rules, and in a few cases simply as guidance for the tribunal. The study concludes that

> "the IBA Rules have been applied widely in international arbitrations involving Latin American parties (…). Their use has extended to several of their provisions. Practitioners in Latin America would appear to be conversant with the IBA Rules and here, as elsewhere, the Rules are well on their way to becoming the common ground for the production of evidence in international arbitration, especially -but not onlywhere there is a risk of a cultural clash".

While it is likely that ICC arbitrations in Latin-America are not representative of the global arbitration practice, the study shows how ready arbitral tribunals formed by experienced arbitrators include the rules in their procedural orders on their own initiative in the use of their powers to organize the arbitral procedure. This fact is thought to be contrary to the standard belief that such rules are used as guidelines only, and are not binding. Their binding character is given either by the parties or, as seen in the study just referred to, by the arbitrators themselves.

b) The widespread use of soft law in recent international arbitration reflects the imperious need felt by the

different stakeholders and has not remained unnoticed by legislators and courts. To the writers' knowledge, there are still no national laws which have adopted such guidelines as hard law. However, this may change in the future if the current draft of the EU-Canada Trade Agreement (CETA) [166] eventually comes into force. Its Article

X.25 in relation to arbitrators' independence states that Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment). Furthermore, in its Article X.33 in relation to Transparency of Proceedings, it states that "The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter".

c) National courts have frequently cited with approval the various guidelines discussed above. "The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009" [167] give a comprehensive report on the application of such guidelines by courts in various jurisdictions, as well as some institutions like the ICC, the LCIA and ICSID. Other reports signal their limited used (in 2005) [168] . While –depending on the jurisdiction and the institutiontheir application is irregular, they have very often been argued by parties as the standard against which the issues at stake had to be adjudicated [169] , Courts have emphasized their non statutory origin but have still discussed their content when adjudicating the case. A few examples illustrate the point.

In a confidential case [170] , the English High Court dismissed an action to annul an award based on the arbitrators' misconduct. The judge first stated that

> "in my judgment that conclusion is not altered in any way by the IBA Guidelines, which do not assist the claimants for a number of reasons. First, as paragraph 6 of the Introduction to the Guidelines makes clear, the Guidelines are not intended to override the national law. It necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion".

But after such concluding statement the judge went into quite a lot of detail in reviewing the "Red" and "Orange" List annexed to such guidelines, thereby accepting, it may be inferred, that he gave them considerable value.

The judgment of the Swedish Supreme Court in Andres Sillen v Ericsson AB [171] is also noteworthy. Although in a domestic case, the court makes extensive reference to the IBA Rules of Ethics along with internal rules (the Swedish Arbitration Act and the rules of the bar association) as setting the applicable standard. Similarly, the Swiss Supreme Court [172] stated:

> "In order to verify the independence of the arbitrators, the Parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration approved on May 22, 2004 [Quotes to law articles omitted; also in subsequent sentences of the judgment]. Such guidelines admittedly have no statutory value; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of inte **r** ests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals".

For its part, the Audiencia Provincial of Madrid [173] referred to the IBA Guidelines on Conflicts of Interest in International Arbitration stating that they were not applicable even as a matter of orientation, because they were not enacted law but rather guidelines issued by a private association. Moreover they stated that there were enough indications in Spanish law to adjudicate the issue, and that the award was domestic, but nevertheless they consulted the Guidelines and classified the conflict as on the "orange list". It set aside the award inter alia for not disclosure of certain circumstances which might have the appeared to lack impartiality and / or

independence on the part of the presiding arbitrator. The Superior Court of Justice of Madrid [174] extensively quoted the Guidelines praising its precision, stating however that it belonged to it to follow or not the consequences that the Guidelines proposed for each of the situation listed.

The approach of national courts towards the IBA Rules on Evidence is necessarily affected by its very frequent application in arbitration procedures as discussed above. To that extent, they are frequently converted into actual rules of procedure be it by parties' agreement or by the decision of the arbitral tribunal. The Swiss Supreme Court held that a violation of the IBA Rules, or of the evidentiary rules of the local Procedural Code, were not grounds for challenging an arbitral award since they were not included in the grounds of annulment laid down in the relevant national legislation [175] . However, authors have stated that

> "even in most instances considered "non binding", published cases from the United States, England, Singapore and Canada and other jurisdictions may be found where the IBA Rules have been referred to when determining whether the acts of an arbitrator constituted serious departures from fundamental procedural due process [176] **"** .

Several examples can be found [177] . The Rules have been accepted by the English courts even if the duties of the parties there under may be different from the standards applicable under the arbitration laws of the place of the arbitration [178] , and **a** pplied with no hesitance when they governed by order of the arbitral tribunal [179] . A similar approach has been taken by the courts in New York [180] and in Singapore [181] . In a reported judgment on an award in a procedure where the IBA Rules on Evidence where not agreed upon by the parties or directed by the arbitral tribunal, and where a breach of due process was alleged in relation to requests to produce certain allegedly confidential documents, the judge made express reference to Art 3 (7) –now 3 (8) thereof, stating that it sets up a procedure whereby such situations can be dealt with [182] .

Commentators state that "notwithstanding the general lack of express reliance on the IBA Arbitrators Guidelines by courts and institutions, in fact they have had tremendous impact [183] ". It is thought that this impact, demonstrates that many of the different stakeholders in a system of adjudication of legal disputes, do consistently resort to one or another form of soft law. They progressively find a common albeit necessarily incomplete answer to commonly felt shortcomings in the solutions that the existing enacted instruments, offers to them. When adopting such rules, and judges when upholding their choice, they are in fact creating the a new lex proceduralia mercatoria [184] . Like its illustrious predecessor, the lex mercatoria, tout court, its origin is customary and spontaneous. Its first manifestation would be the need to increase procedural predictability in international arbitration, be it by parties' agreement, by arbitrators' decisions, or simply as well known and tested guidelines. Second, that such new law is enshrined in instruments drafted by a cross-section of user groups and is evolving with the practice of international commercial arbitration meeting different approaches. It gives an answer to one of the current uncertainties in international arbitration, its lack of procedural predictability, and the faint contours of the notion of due process. To that extent, while certainly due process does not require the application of such soft law to be satisfied, the application of soft law, particularly, lacking agreement among the parties, by order of the arbitral tribunal, would satisfy the requirements of due process in international commercial arbitration.

5. CONCLUSION: SOFT LAW AS A REQUIREMENT OF DUE PROCESS IN INTERNATIONAL ARBITRATION

In the previous pages we have reviewed the path whereby the arbitration procedure has made itself independent from most constraints of the procedural law of the seat of arbitration, and how "due process" is –other than a few remaining local mandatory rulesthe only requirement at a national level, at the level at institutional rules, and at the enforcement level, that an arbitration has to meet. Constitutional laws and international conventions

offer little guidance and defer to the specific arbitration laws and conventions. There is scant guidance at such levels of the specific requirements that arbitral procedure has to meet. In the absence of parties agreeing specific rules of procedure, this represents a conflict between arbitration's flexibility, and the needed predictability to properly defend and present a party's case in equality. It has been argued that "the rule of law is the law of rules" and those rules have to be agreed, by the parties or by the arbitrators themselves, ex ante, to the extent possible before the specific problem arises. National courts have been reluctant to interfere with the parties' choice, when electing arbitration, in order to develop their case in a flexible procedural framework, but they have been ready to step in when the grounds of the awards have not been foreseen by the parties. It is submitted that the requirement of predictability should also apply to the arbitral procedure. This need has been recognized in the arbitration community by the issuance of so called soft law rules or guidelines which address many of the hitherto controversial issues with a reasonable amount of detail taking into account all the circumstances. In addition, more detailed procedural rules are either incorporated into institutional rules, or the institutional rules require or encourage the parties to incorporate them by agreement. As a consequence, the rules of soft law are increasingly used in international arbitration, be it by agreement of the parties or by decision of the arbitrators, and in limited situations they are becoming "hard law". They are progressively recognized by ordinary courts as the standard against which due process requirements have to be measured. To that extent, it is thought that a lex mercatoris proceduralia is emerging. The first leg of such lex is that an ordinate conduct of the arbitral proceedings requires a detailed ex ante procedural framework in order that the parties may meaningfully "present their case", be it by their agreement or by decision of the arbitrators. The second leg is a requirement may be emerging under the due process heading that in the absence of such agreement, arbitrators shall determine the applicability of such rules of soft law that they deem appropriate for the conduct of the case. It is thought that courts will gradually require compliance with this requirement.

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[2] Aristotle, Politics, book III, ch xi, # 19 at 127, Ernest Baker, transl., Oxford University Press.

[3] W.W. Park, The procedural soft law of international arbitration: Non-governmental instru-ments, in L. Mistelis & J. Lew, Pervasive Problems in International Arbitration, p. 143.

[4] J. Lew, L. Mistelis and S. Kröll, Comparative Commercial Arbitration, Kluwer Law Internatio-nal, 2003, p. 5.

[5] Redfern and Hunter on International Arbitration, 5h edition by N. Blackaby and C. Partasides, Oxford University Press, 2009, p. 31.

[6] C. Liebscher, Preliminary Remarks, in R. Wolff (ed.) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary, p. 3.

[7] United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards done at New York, 10 June 1958, United Nations Treaty Series, vol. 330, p.38 No. 4739 (1959), (the "New York Convention").

[8] The 101 respondents to the International Arbitration Survey 2013: Corporate choices in Inter-national Arbitration, Survey by PricewaterhouseCoopers and Queen Mary College, London however ranked the expertise of the decision maker as the first perceived benefit, neutrality (i.e. from a national court) only second and enforceability fourth, after confidentiality. Flexibility of procedure was ranked fifth.

[9] Redfern and Hunter on International Arbitration, op. cit., p. 33.

[10] Leading Spanish authors indicate that the rules of procedure are the development and spe-cificity of the principles of natural justice which govern it, i.e. the right to be heard (audiatur et altera pars), right of defence, equality among the parties. A de la Oliva Santos et al., Derecho Procesal, Introducción, 2 ed., p. 49. See also in the same sense J. Montero Aroca et al., Derecho Jurisdiccional I, Parte General, 13th edition, p.320.

[11] As R. David stated in Arbitration in International Trade, p. 29, “the arbitrator was chosen intuitu personae (...) a man of wisdom of whom it was expected that he would be able to devise a satisfactory solution for a dispute”

[12] This was the case in Roman Law: Digest 4.8.17.3: there is no such a thing as an arbitration where the arbitrator does not have an unfettered discretion in his judgement; Seneca, De beneficiis, 3.7.5. The arbitrator does not have to rule according to enacted law unless so direc-ted by the parties. Quoted in A. Fernández de Buján y Fernández, Bases romanísticas del arbitraje actual. Análisis de las concordancias entre el Derecho justinianeo y la legislación vigente en materia de arbitraje, Revista Crítica de Derecho Inmobiliario, nº 743.

[13] D. V. Sandifer, Evidence Before International Tribunals, (1975), Procedural Aspects of International Law Series, vol. 13.

[14] Redfern and Hunter on International Arbitration, op. cit., p. 41.

[15] See particularly the various articles from W.W. Park whose reading together from the personal experience of the writer, essentially a senior transactional lawyer with occasional arbi-tration experience, has motivated this paper: The procedural soft law of international arbitration: Non-governmental instruments, op. cit., The 2002 Freshfields Lecture – Arbitration’s Protean Nature. The Value of Rules and the Risks of Discretion, Arbitration Internatio-nal, Volume 19, Number 3, p. 284 and others.

[16] S. D. Franck, J. Freda, K. Lavin, T. Lehmann, and A. van Aaken, International Arbitration: Demographics, Precision and Justice, to be published as a chapter of the ICCA 2014 Congress Proceedings. I do thank Professor Susan D. Franck for having allowed me to consult a final draft of the article prior to its publication. The survey was administered to 552 participants in the Congress out of 1031 registrants, with substantial experience in international arbitration as the study develops in great detail, and therefore represents the broadest expression and study of the opinions among practitioners in international arbitration.

[17] M. Scherer in R. Wolff (ed.), op. cit., p. 279,

[18] G. Kaufmann-Kohler, Globalization of Arbitral Procedure, Vanderbilt J. Transn’l Law, 1321 (October 2003).

[19] Bank Mellat v Helliniki Technili SA [1984] QB 291, [1983] 3 All ER 428 (CA) quoted by Redfern and Hunter on International Arbitration, 5h edition by N. Blackaby and C. Partasides, Oxford University Press, 2009, p. 191.

[20] See as examples Swiss Private International Law Statute (1990) (“PIL”), article 176 (1) and (English) Arbitration Act 1996 (“AA”), section 2 (1).

[21] UNCITRAL Model Law on International Commercial Arbitration (United Nations docu-ments A/40/17,

annex I and A/61/17, annex I), (the “Model Law”), Art. 1 (2).

[22] See for all the New York Convention where the expression “where the award was made” is to be found in many of its provisions.

[23] Redfern and Hunter on International Arbitration, op. cit., p. 181.

[24] N. Robbins, “The Arbitral Seat is No Fiction. A Brief Reply to Tatsuya Nakamura’s Commentary, “The Place of Arbitration in International Arbitration – Its Ficticious Nature and the Lex Arbitri”, Mealey’s International Arbitration Report, January 2001, Arbitration Note; Vol. 16; No. 1, p. 7.

[25] Redfern and Hunter on International Arbitration, op. cit., p. 185.

[26] W.W. Park, Why Courts Review Arbitral Awards, in Festschrift für Karl-Heinz Böckstiegel, p 596

[27] See the discussion in depth in E. Gaillard, The legal theory of international arbitration, passim.

[28] Signed at Geneva on 27 September 1927, and published in 92 L.N.T.S. 301 (1929).

[29] Signed at Geneva on 24 September 1923, and published in 27 L.N.T.S. 157 (1924)..

[30] The Institute of International Law in article 9 of its Amsterdam Resolution still proclaimed that “The law of the place of the seat shall determine whether the procedure (…) may be freely established by the parties”. Institute of International Law Yearbook, 1952, vol 44, part I, p. 597.

[31] On the discussion of the inconsistency in the French language version, equally authentic, which states “ne seront refusées”, the history of its drafting, and the attitude of some natio-nal courts in interpreting this provision, see C. Borris and R. Hennecke in R. Wolff (ed), op. cit., p. 263-265.

[32] The New York Convention, in its Article VII 1, allows the contracting states to adopt more favorable rules for recognition and enforcement of foreign arbitral awards. No distinction will be made in the following discussion among judicial precedents under the New York Convention or under its national laws, which is particularly clear in France where the an-nulment of an arbitral award in its country of origin does not constitute grounds for refu-sing enforcement. See the discussion in Redfern and Hunter on International Arbitration, op. cit., p. 673.

[33] See the examples in Redfern and Hunter on International Arbitration, op. cit., p. 651, C. Liebs-cher in R. Wolff (ed), op. cit., p. 369.

[34] On its influence in international arbitration in relation to the autonomy of an arbitration legal order, see D. Harscher, L’influence de la doctrine et la jurisprudence française en matiè-re d’arbitrage, (2005) Revue de

l’Arbitrage p. 412.

[35] Pabalk Ticaret Limited Sirketty v Norsolor SA, 112 Clunet 679 (1985)

[36] B. Goldman, Une bataille judiciaire autour de la lex mercatoria. L’affaire Norsolor, (1983) Revue de l’Arbitrage p. 389.

[37] Cour de Cassation of France in Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV) (1994) Revue de l’Arbitrage p. 327.

[38] Cour de Cassation of France in Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices (2007) Revue de l’Arbitrage p. 507.

[39] G. Kaufmann-Kohler, Indentifying and Applying the Law Governing the Arbitration Procedure, in A.J. van der Berg, ed., ICCA Congress Series Nº 9. Improving the Efficiency of Arbitration Agreements and Awards, 40 Years of Application of the New York Convention , p. 354.

[40] Code de Procedure.

[41] J. Lew, L. Mistelis and S. Kröll, Comparative Commercial Arbitration, Kluwer Law International, 2003, p. 28.

[42] Article V 1. (b): (…) the party (…) was otherwise unable to present his case.

[43] Article 19, Determination of the rules of procedure.

[44] The Institute of International Law totally changed course. In article 6 of its Santiago de Compostela Resolution, it proclaimed the full autonomy of the parties to determine the procedural rules and (failing such) may be derived (…) as well from non-national sources such as principles of international law, general principles of law, and the usage of international commerce”. Institute of International Law Yearbook, 1989, vol 63, part I, p. 330.

[45] The following can be listed: Switzerland (Art. 192 Private International Law Act “PIL”); Belgium (Art. 1717 (4) of its Judicial Code; Sweden (Art. 51 of the Swedish Arbitration Act); Tunisia (Art 78 (6) of its Arbitration Code); Peru (Art. 126 of its General Law on Arbitration); Panama (Art 36 of the Decree of the General Arbitration Regime).

[46] Which in their 2010 version include a sample waiver statement.

[47] Art. 28.9: by agreeing to arbitration under these Rules, the parties (…) irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial aut-hority (…). Version in force from

1 April 2013.

[48] Lew, Mistelis, Kröll, op. cit, p. 5

[49] G. B. Born, International Commercial Arbitration, Second Edition (2014) p. 2198, quotes many authorities in support of the proposition: Kaufmann-Kohler, Globalization of Arbitral Procedure, 36 Vand. J. Transnat'l L. 1313 (2003); Peter, Witness Conferencing Revisited, in S. Bond (ed.), Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI 156 (2004);Carlston, Procedural Problems in International Arbitration, 39 Am. J. Int'l L. 426, 448 (1945). See also ICC, Controlling Time and Costs in International Arbitration 6 (2d ed. 2012) ("experience shows that in practice it is difficult at the time of drafting the [arbitration] clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes").

[50] P.D. Ehrenhaft, Effective Commercial Arbitration, 9 Law & Poli'y Intl Bus, p. 1191.

[51] ILC, Memorandum on Arbitral Procedure, Prepared by the Secretariat, U.N. Doc. A/CN.4/35, II Y.B. I.L.C. 157, 165, 172 (1950) ("no agreement could foresee all possible procedural questions which might arise")

[52] P. Mayer, La liberté de l'arbitre, Revue de l'Arbitrage, 2013, 2, p. 346.

[53] W.W. Park, The Procedural Soft Law of International Arbitration: Non-Governmental Instruments, op. cit., p. 149. A more comprehensive discussion of ex ante and ex post rule–making by the same author in Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion, The 2002 Freshfield Lecture, in Arbitration International, volume 19, number 3, 2003, p. 294.

[54] S. Barona in Comentarios a la Ley de Arbitraje, Silvia Barona (ed), p. 1123.

[55] Lord Saville, Denning Lecture, 'Arbitration and the Courts', p. 157, quoted in Redfern and Hunter on International Arbitration, 5th edition by N. Blackaby and C. Partasides, Oxford University Press, 2009, p. 463.

[56] Art. 19 (2) with reference to Art. 18.

[57] Article 18 Model Law; Section 1042 (1) Tenth Book of the German Code of Civil Procedure in force as of 1 January 1998.

[58] Art. 24.1. Spanish Arbitration Act (Ley 60/2003 of 23 December, de Arbitraje) as amended.

[59] Section 33 (1) (a) AA.

[60] Section 595 (1) No.2 Austrian CPC.

[61] Art. 21 (2) Brazilian Arbitration Law.

[62] The Spanish Arbitration Act, in the title to Art. 24, which although not developed in the article itself, has been recognized as binding to the arbitrators unanimously by the courts. Aut-horities in S. Barona, loc. cit., p. 1130 et seq.

[63] Article 1492 (4) French Code of Civil Procedure (Book IV on arbitration of as amended by Decree Nº 2011-48 of 13 January 2011.

[64] Article 182, 3 Swiss Private International Law Act (1990).

[65] Section 10. (c) United States Federal Arbitration Act first enacted 12 February 1925 (43 Stat. 883) as amended.

[66] N. D. O'Malley, Rules of Evidence in International Arbitration , p. 5.

[67] Redfern and Hunter on International Arbitration, op. cit., p. 601 and cases cited therein.

[68] China Holdings v Grand Pacific Holdings CACV Unreported, 2011 (CA (HK)), commented by James Rogers and Matthew Townsend in International Arbitration Law Review, 2013.

[69] G. B. Born, op. cit., p. 2179.

[70] See, however, in that respect, Guidelines 5 and 6 of the IBA Guidelines for Party Representation, which empowers the arbitral tribunal to exclude a newly appointed counsel if this would create a conflict of interest with an appointed arbitrator.

[71] Gary B. Born, loc. cit.

[72] It is noteworthy that according to the text of Article V of the Convention the enforcing court "may" but is not bound to refuse. A different matter is that a given national law may impo-se to the recognizing court the obligation to refuse enforcement if any of the grounds provi-ded in the Convention is met, rectius, is evidenced by the party against which enforcement is sought.

[73] Model Law, Art. 36 (1).

[74] In that sense, incapacity of the parties, invalidity of the arbitration agreement, notice of appointment of the arbitrator(s), dispositive part of the award vs terms of submission, do not require a comprehensive examination of the award by the court of enforcement. It could be argued that although the ground procedure followed vs the

procedure agreed on or appli-cable by law requires such examination, it is a rather mechanical comparison.

[75] Model Law, Art. 5: In matters governed by this Law, no court shall intervene except where so provided in this Law. Article 946 (2) Quebec Code of Civil Procedure states that the court cannot examine the merits. A limited exception is Section 69 of the (English) Arbitration Act 1996 ("AA"), and in the US, an arbitral award will also be set aside if the award was made in " 'manifest disregard' of the law." First Options of Chicago v. Kaplan, 514 U.S. 938, ——, 115 S. Ct. 1920, 1923, 131 L.Ed.2d 985. "Manifest disregard of the law may be found if [the] arbitrator[s] understood and correctly stated the law but proceeded to ignore it." Kanuth v. Prescott, Ball, & Turben, Inc., 949 F.2d 1175, 1179 (D.C.Cir.1991)

[76] As has been submitted, this defence is a basic element of (international) public policy, in it-self grounds for denying enforcement of an award under the New York Convention (Art. V 2. (b)) and as such is redundant: M. Virgós, El reconocimiento y ejecución de laudos arbitrales extranjeros, Revista del Club Español del Arbitraje, nº 5, Sección Artículos, Segundo cuatrimestre de 2009, p. 8.

[77] M. Scherer in R. Wolff (ed), op. cit., p. 298.

[78] Generica Limited v Pharmaceuticals Basics Inc, 1078-9 (7th Cir, 1997). Many decisions state that the burden to resist enforcement is a heavy one, but in practice some find this duty dischar-ged: See Guang Dong Light Headgear Factory Co. Ltd. v. ACI International Inc., US District Court for the District of Kansas, Case No. 03-4165-JAR, denying summary judgment; Qing-dao Free Trade Zone Genius Int'l Trading Co. Ltd., v. P and S International, Inc., US District Court for the District of Oregon, Case No. 08-1292-HU, denying summary judgment (notice of arbitration in Chinese is not a proper notice under the Convention).

[79] As the US courts have stated: "The Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Conven-tion specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention Art.. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention". Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, 126 F.3d 15 (2d Cir.1997), cited and quoted subsequently in many cases.

[80] Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RATKA) 508 Fd 969 (2nd Cir 1974) 975.

[81] Soleimany v Soleimany [1998] 3 WLR 811, QB 75 (CA).

[82] Quoted with approval by the Privy Council in Cukurova Holding A.S (Appellant) v Sonera Holding B.V (Respondent),Privy Council Appeal No. 0096 of 2013 [2014] UKPC 15.

[83] Oberlandsgericht Frankfurt, 26 ScH 03/09, 12 October 2009, commented by A.J. van der Berg,

Kluwerarbitration.

[84] In England in 2006, after ten years of the Arbitration Act, as many as 30% of the challenges on procedural grounds (Section 68 of the Act) were successful, as reported in Woodhouse English Act‘s Anniversary: Statistics Settle the Proand Anti-Arbitration Debate (2006) 2 Global Arbitration Review, p. 29; in Switzerland in 2006 the figure for all types of successful challenges restricted to international awards was between 5.4% and 7%. Dasser, Internatio-nal Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, (2007) ASA Bulletin 25 (3), p 444.

[85] The standards of adversarial proceedings were already discussed in the case adjudicated by the Oberlandsgericht Hamburg 2 April 1975, II YBCA 241 (1977).

[86] (Swiss Federal Tribunal) Judgment of 30 December 1994, 13 ASA Bull. 217 , 221 (1995) .

[87] A. H. Baum, International Arbitration: The Path toward Uniform Procedures, Liber Amicorum in honour of Robert Briner, p. 51.

[88] Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III) , Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and im-partial tribunal, in the determination of his rights and obligations and of any criminal char-ge against him; European Convention on Human Rights adopted by the Council of Europe in Rome on 4 November 1950, Article 6: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[89] STC (Spain)43 / 1988 of 16 March; AATC (Spain)701 / 1988 of 6th June; AATC (Spain)179 / 1991 of 17 June.

[90] Article 41.2 of the Ley Orgánica del Tribunal Constitucional and STC 176/1996 of 11 November (RTC 1996, 176).

[91] Redfern and Hunter on International Arbitration, op. cit., p. 605. See a full discussion in G. Petrochilos, Procedural Law in International Arbitration, p. 110 – 165.

[92] R. Briner and F. von Schlabrendorff, Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration in R. Briner, L. Fortier, L. Yves , K.P. Berger and J. Bredow (eds), Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel 89 at 93. In Bramelid and Mälmsröm v Sweden DR 1984, 38 the EHR Commission stated that “a distinction must be drawn between volun-tary and compulsory arbitration. Normally, Article 6 poses no problem where arbitration is entered into voluntarily”.

[93] EHR Court Drewer v. Belgium, A35, 2EHRR 439, p.49.

[94] EHR Court Osmo Suovaniemi and others v. Finland, nº 31737/96; EHR Court Jakob Boss Söhne v. Germany, nº 18479/91.

[95] C. Liebscher, The Healthy Award – Challenge in International Commercial Arbitration, p. 78.

[96] M. Kurkala and S. Turunen, op.cit., p. 11.

[97] EHR Commission, Heinz Schiebler v. Germany, Nº 18805/91. That courts exercise supervi-sion over arbitration is universally accepted. The contrary is not a seriously arguable proposition at least since the work of W.M. Reisman, Nullity and Revision – The Review and Enforcement of International Judgments and Awards (1971)

[98] EHR Court Dombo Beheer v. Netherlands, A.274 (1993).

[99] Some commentators suggest that it is a matter of pure chance whether the end result is a good resolution of the dispute: J. Uff, Predictability in International Arbitration, Internatio-nal Commercial Arbitration: Practical Perspectives, p.151.

[100] ILC, Memorandum on Arbitral Procedure, Prepared by the Secretariat, Doc. A/CN. 4/35, II Y.B. I.L.C. (1950) 172.

[101] M. Schneider, The Problem with Predictability, 29 ASA Bulletin 1/2011 (March), p. 2.

[102] G.B. Born, op. cit, p. 2197 / 2198.

[103] M. Schneider, op. cit., p. 1.

[104] W.W. Park, The Procedural Soft Law of International Arbitration: Non-Governmental Instruments, op. cit., p. 144.

[105] W.W. Park, The Procedural Soft Law of International Arbitration: Non-Governmental Instruments, op. cit., p. 153.

[106] W.W. Park, The Predictability Paradox: Arbitrators and Applicable Law, 11 ICC Dossiers (ICC Institute of World Business Law 2014).

[107] S. Perloff, The Ties that Bind: the Limits of Autonomy and Uniformity in International Commercial Arbitration, 13 Journal of International Law, 323, p. 2.

[108] E.g. a view from a Spanish lawyer, M. Rodríguez Vargas, Los Privilegios probatorios en arbitraje internacional, en especial el secreto profesional, priviliegio abogados-cliente y privilegio de negociación, Spanish Arbitration Review, 15/2012, p.80-102, albeit concluding the that absence of detailed and harmonized rules are not necessarily a bad thing.

[109] Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann, and Anne van Aaken, op. cit.

[110] D. W. Rivkin, Clayton Luutz / University of Sydney International Arbitration Lecture, The Impact of International Arbitration on the Rule of Law, 2012.

[111] S. Menon, International Arbitration: the Coming of a New Age for Asia (and Elsewhere), ICCA Congress Series Nº 17 (2013), p. 6.

[112] J. Paulson, The Idea of Arbitration, p. 92.

[113] A. Scalia, The Rule of Law as a Law of Rules, The University of Chicago Law Review, vol. 56 num. 4 1989, p. 1179.

[114] Tom. R. Tyler, Why People Obey the Law.

[115] W.W. Park, The 2002 Freshfields Lecture – Arbitration's Protean Nature. The Value of Rules and the Risks of Discretion, op. cit., p. 284.

[116] K.-H. Böckstiegel, Major Criteria for International Arbitrators in Shaping an Efficient Proce-dure, Special Supplement 1999: Arbitration in the Next Decade, Proceedings of the International Court of Arbitration 75th Anniversary Conference, p. 52.

[117] J.J. Sentner, Jr., Arbitration Discretion: Should It Be Restricted by Party Stipulation of Go-verning Procedural Rules? in AAA Handbook on International Arbitration Practice, 2010, p. 160.

[118] W.W. Park, The Procedural Soft Law of International Arbitration: Non-Governmental Instruments, op. cit., p. 147 suggests that the emphasis on flexibility adopted by the global arbitration institutions is a Darwinian survival mechanism, whereby they market themsel-ves avoiding the tough questions about what fairness means when legal cultures diverge in many procedural aspects

[119] Art 19 Rules of Arbitration of the ICC; 14.2 LCIA Arbitration Rules; Art. 19 (1) Arbitration Institute of the Stockholm Chamber of Commerce.

[120] Art. 19 (1).

[121] Art. 34 (2) (a) (iv) and 36 (1) (a) (iv) of the Model Law, and Art V (1) (d) of the New York Convention.

[122] Art. 19 (2). The English Arbitration Act sets a sweeping provision: "It shall be for the tribunal to decide all procedural and evidentiary matters, subject to the right of the parties to agree any matter" (Section 34 (1)). Similar wording is to be found in Article 25, 1 of the Spanish Arbitration Act. The Swiss provision is shorter(Article 182, 2 of PIL): If the parties have not determined the procedure, the Arbitral tribunal shall determine it to the extent necessary.

[123] Art. 25.1 ICC Rules: "The arbitral tribunal shall proceed (…) to establish the facts of the case by all appropriate means"; Art. 14. 5 of the LCIA Rules: "The Arbitral Tribunal shall have the widest discretion to discharge these general duties [in relation to the conduct of the proceedings], subject to such mandatory law(s) or rules as the Arbitral Tribunal may decide to be applicable"; Art. 15. 1 Swiss Rules: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard"; Art. 19 (1) Rules of the Arbitration Institute of the Stockholm Chamber of Commerce: "Subject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate"; Art. 33 1. CIETAC Rules: "The arbitral tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties"; Rule 16. 1 SIAC Rules: "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties".

[124] Articles 15, 17, 19, 20 and 21.

[125] Article 18.5 makes compulsory such Guidelines contained in Annex to the Rules.

[126] Redfern and Hunter on International Arbitration, op. cit., p. 79.

[127] G. Petrochilos, op. cit, p. 216

[128] Its Article 15 simply prescribes parties to be treated with equality and given a full opportunity of presenting his case and that a hearing is to be held if one party so requires; Articles 18 and 19 that there must be one consecutive exchange of written submissions; Article 27 that if he tribunal appoints an expert parties may question him or her at a hearing and pre-sent their own expert witnesses in relation to the points at stake.

[129] No discussion is made of specific arbitrations like investment or sport arbitration which have their own rules.

[130] Is fair to say that in parallel to the concerns of related to predetermining the procedure on due process grounds, there is also an even greater pressure to speed up the arbitration procedures. It has been signaled that without the agreement of the parties arbitrators may fear that short-cutting the procedure may give rise to challenges based precisely on breach of due process. See J.E. Beerbower, International Arbitration: Can We Realise the Potential? Arbitration International, Volume 27 Issue 1, p. 80.

[131] Art. 23 1. g).

[132] Further reference is made in the Annex to the ICC Report on Techniques for Controlling Time and Costs in Arbitration, ICC International Court of Arbitration Bulletin Vol. 18, nº 1.

[133] Art. 14.1.

[134] Rule 21 (a) and (b)

[135] Redfern and Hunter on International Arbitration, op. cit., p. 370

[136] See some examples in D. Hascher, Introduction, Special Supplement 2010: Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders issued by Arbitral Tribunals acting under the ICC Rules of Arbitration (2003-2004).

[137] There are numerous judgments. E.g. Petroships Pte Ltd of Singapore v. Petec Trading and Investments Corporation of Vietnam and Others [2001] EWHC Commercial 418 which extensi-vely refers to and quotes the full commentary.

[138] Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill (Chairman, the Right Honourable Lord Justice Saville) February 1996.

[139] In Latvian Shipping Company v ROSNO, [2012] EWHC 1412 (Comm), Field J revised the current authorities in the sense indicated in the text.

[140] Gbangola v Smith and another [1998] 3 All ER 730 (QBD (T&CC).

[141] Pacific China Holdings v Grand Pacific Holdings CACV, Unreported, 2011 (CA (HK)),*Int. A.L.R. N-17, commented by J. Rogers and M. Townsend, Int. A.L.R. 2013, 16(2), N17-N18.

[142] G. Knuts, Jura Novit Curia and the Right to be Heard – An analysis of Recent Case Law, Arbi-tration International, 2010, Volume 28 Issue 4, p. 673.

[143] In Cameroon Airlines v Transnet Limited [2004] EWHC 1828 (Comm) Langley J cites with ap-proval several pre-Act judgments in this sense. More recently in Stockton Capital LLP vs Atlantic-Pacific Capital, Inc [2014] EWHC 1459 (Comm): in deciding that a certain provision in the contract among the parties was an unenforceable penalty, the tribunal dealt with an issue of which Brockton had had no notice and no opportunity to address, and in so doing the tribunal in my judgment acted in breach of s. 33 (1) (a).

[144] Zermatt Holdings SA v Un-Life Unpholstery Repairs Ltd [1985] 2 EGLR 14, at15

[145] Dreyfus v. Tusculum, 2008 QCCS 5903.

[146] Engel Austria GmbH v. Don Trade, CA Paris, pole 1, 1ere ch, 3 déc 2009, no RG 08/13618.

[147] The Superior Court of Catalonia in its judgment STSJC of 25 February 2013 Rollo 16,2012, in a domestic arbitration, upheld the award very narrowly since it held that the heading of damages awarded (moral damages) was included in those provided in the Civil Code and the-refore parties even if this had not been argued, were expected to recognize its availability.

[148] G. Knuts, op.cit., p. 681.

[149] Any list may be arguable. As a recent example, we can quote the list of content of L.W. Newman and M.J. Radine (ed), Soft Law in International Arbitration.

I. Drafting Arbitration Clauses Before and After a Dispute.

1. AAA Drafting Dispute Resolution Clauses: A practical Guide.

2. IBA Guidelines for Drafting International Arbitration Clauses.

II. Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings.

1. College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration.

2. ICC Techniques for Controlling Time and Costs in Arbitration.

3 CPR Guidelines for Early Disposition of Issues in Arbitral Proceedings.

4.UNCITRAL Notes on Organizing Arbitral Proceedings.

5. ICC Note on the Appointment, Duties, and Remuneration of Administrative Secretaries. III. Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives.

1. IBA Guidelines on Conflicts of Interest in International Arbitration.

2. International Bar Association Rules of Ethics for International Arbitration.

3.ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes.

4.IBA Guidelines on Party Representation in International Arbitration.

IV.Disclosure of Documents and Presentation of Evidence in International Arbitration.

1.CRP Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

2.CDR Guidelines for Arbitrators Concerning Exchanges of Information.

3.IBA Rules on the Taking of Evidence in International Arbitration.

4.ICC Techniques for Managing Electronic Document Production When it Is Permitted or Required in International Arbitration.

V.Soft Law Guidance on Drafting Awards in International Arbitration.

1.CPR Guidelines for Arbitrators Conducting Complex Arbitrations.

2.ICC Issues Checklist for Arbitrators Drafting Awards.

3. CPR Protocol on Determination of Damages in Arbitration.

[150] W.W. Park, The Procedural Soft Law of International Arbitration. Non-Governmental Instruments, in L. Mistelis & J. Lew, op. cit., p 141.

[151] A.H. Baum, International Arbitration: The Path toward Uniform Procedures, in Liber Amico-rum in honour of Robert Briner p. 51; K.-H. Böckstiegel, op. cit., p. 49; J. Paulsson, Differing Approaches in International Arbitration Procedures: a Harmonization of Basic Notions, 1 ADR Currents, p. 19.

[152] M. Kerr, Concord and Conflict in International Arbitration, 13 Arbitration International, p. 126

[153] Resolution 31/98 adopted by the General Assembly on December 15, 1976, as revised in 2010, Official Records of the General Assembly, Thirty-first Session, Supplement Nº 17 (A/31/17), chap. V, sect. C.

[154] Notably the Hong Kong International Arbitration Centre.

[155] The UNCITRAL notes on organizing arbitral proceedings provide a useful checklist of matters to be agreed or ordered by the tribunal for an efficient handling of the procedure. A similar use has the ICC Techniques for Controlling Time and Costs in Arbitration. Those instruments do not provide specific answers to procedural difficulties but attempt by iden-tifying them, to have agreed their treatment ex ante by agreement of the parties or direc-tions of the arbitral tribunal.

[156] AAA/ABA Code of Ethics for Arbitration in Commercial Disputes (effective March 1, 2004), Note on Construction; IBA Rules for Taking Evidence in International Commercial Arbitration (revised on May 29, 2010, Preamble 1. and 2.; IBA Guidelines on Conflict of Interest in International Arbitration (revised on October 23rd 2014), Introduction 6., IBA Guidelines for Party Representation (revised on May 25, 2013) par 1 and 3. The Rules of Ethics for Inter-national Arbitrators are nowadays somehow outdated and partially replaced by the Guide-lines on Conflict of Interest also provided it was only binding upon agreement of the arties (Introductory Note).

[157] Redfern and Hunter on International Arbitration, op. cit., p. 393: “[The 1999 edition] has become almost

universally recognized as the international standard for an effective, pragmatic and relatively economical document production regime". The authors refer to those princi-ples not only on document production but also in adverse inferences, fact witness evidence, expert witness evidence and other procedural matters. Similarly, Lew, Mistelis and Kröll, op. cit. in pag 571 et seq.

[158] As a random result, in January 2015 Google offers 928.000 results for the AAA/ABA Code, 350.000 for the IBA Rules on Evidence, 119.000 for its Rules on Ethics, 114.000 for its Guide-lines for Party Representation, and "only" 48.000 for its Guidelines in Conflict of Interest.

[159] S. Greenberg, J. R. Feris, References to the IBA Guidelines on Conflicts of Interest in International Arbitration when Deciding on Arbitrator Independence in ICC Cases, ICC Internatio-nal Court of Arbitration Bulletin Vol. 20 No. 2,p. 33.

[160] This is consistent with informal ICC early views expressed by a former Secretary General: A.M Whitesell, Independence in ICC Arbitrat¡on: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators, ICC International Court of Arbitration Bulletin, Special Supplement Nº 690 E, p. 36-38 (2007):"There is a fundamental incompatibility between the [ICC] Rules and the IBA Guidelines. Article 7 (2) of the [ICC] Rules requires a subjective approach to disclosure ... Hence it is not possible in ICC arbitration to have a list of situations which are said to be objective and never to require dis-closure as provided in the IBA Guidelines green list.

[161] 27 Arbitration International (2011), p. 288.

[162] L.W. Newman and M.J.Radine (ed), op.cit., p. 248.

[163] In the ICDR, e.g. Case No. 50117, unpublished, quoted in N. D. O'Malley, op. cit., fn 122 in p. 64; further references in the flowing lines.

[164] Railroad Development Corp (United States of America) v Republic of Guatemala, ICSID, Case No. ARB/07/23 (October 2008).

[165] A. Abbud, R. Alves, V. M. Ruiz, Taking Evidence in Latin America: Some Observations on Local Practices and Use of the IBA Rules, ICC International Court of Arbitration Bulletin, Vol 23, nº 2, p. 20.

[166] September 26, 2014, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[167] The IBA Conflicts of Interest Subcommittee, a Subcommittee of the IBA Arbitration Com-mittee, chaired by M.Scherer, Dispute Resolution International, Vol 4, No 1, May 2010, p. 7.

[168] Y. Furuta, The IBA Rules of Evidence Five Years Later Japan: Retrospective and Prospective, pa-per presented at the Prague 2005 Conference of the International Bar Association, September 29, 2005.

[169] ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm) (19 October 2005), where the judge considered them and concluded that it gave not –and could not give, as stated in the Guidelines themselvescomplete answers, particularly to the case at hand.

[170] A & Others v B & Another [2011] EWHC 2345 (Comm) (15 September 2011).

[171] NJA 2007 s. 841 p.

[172] Judgment of March 20, 2008, 4A_506/20071.

[173] SAP Madrid 30 June 2011, sec.12, file 506/2011, JUR\2011\347818, commented by C. Hen-del, Perspective on Three Recent Annulment Decisions from Spain: Is Where You Stand Determined by Where You Sit?, Arbitration International, 2012, Volume 28 Issue 2, pp 343-350.

[174] STSJM 28 January 2015, 1286/2015.

[175] Judgment of 28 March 2007, reported by M. Scherer, ASA Bulletin, vol. 25, No. 3, p. 518. This is most likely a dicta since the Court had already stated that an adverse inference from a party's refusal to produce documents was not a violation of a party's right to be heard.

[176] N. D. O'Malley, op.cit., p. 9.

[177] E.g. In re Republic of Ecuador, ND Fla., LEXIS 143796, p. 8, stating that the Tribunal may consult [the IBA rules on evidence] on an advisory basis.

[178] Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS [2011] EWHC 3383 (Comm) (20 December 2011) : It is important to have in mind that the ICC arbitration in this case was conducted in accordance with civil law arbitration procedure. In particular the rules for dis-closure of documents were based on the IBA rules. (…) That the procedure concerning dis-closure adopted in the arbitration was akin to the IBA rules is borne out by Procedural Order No 1 of the tribunal". It may be noted that the learned judged qualified the IBA Rules as "civil la" since they departed from the English rules –which in turn are different from the U.S. rules.

[179] ABB AG v Hochtief Airport GmbH & Another [2006] EWHC 388 (Comm) (08 March 2006).

[180] Landmark Ventures, Inc. v. Insightec, Ltd., United States District Court, S.D. New York, November 26, 2014, where the arbitrator had set in Procedural Order Nº 1 that the IBA Rules on Evidence would apply. The court held in relation to a request for documents which ac-cording to the award did not comply with Art. 3 (3) with the IBA Rules, that it was within the powers of the arbitrator to admit it or not in the narrower framework of the IBA Rules.

[181] Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd, [2014] SGHC 220 .

[182] Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH [2008] 3 SLR(R) 871; [2008] SGHC 67.

[183] L.W. Newman and M.J.Radine (ed), op.cit., p. 249.

[184] M.Kurkala and S. Turunen, op. cit, p. 7, use the expression lex proceduralia, and point out the similarities of the underlying circumstances of the emergence of the so called lex mercatoria, as a common law applicable to the merits of the dispute, to those present today in relation to the arbitral procedure.